TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 218.

THE UNITED STATES OF AMERICA, APPELLANT,

vs.

JOHN VALANTE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED FEBRUARY 14, 1923.

(29401)

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INDEX.

	Original.	Print.
Record from United States District Court for the Southern District of New York	1	1
Writ of habeas corpus	1	1
Petition for writ of habeas corpus	2	1
Return to writ of habeas corpus	3	2
Return of warden of city prison	4	3
Affidavit of Elmer H. Lemon	5	3
Order sustaining writ	10	7
Information	11	8
Commitment	14	9
Petition for and order allowing appeal	15	10
Assignment of errors	17	11
Citation and service	18	11
Clerk's certificate	20	12

1 *Writ of habeas corpus.*

The President of the United States of America, To Warden Hanley, warden of the Tombs Prison, Center Street, New York City, greeting:

We command you, that you have the body of John Valente, by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name the said John Valente is called or charged, before Honorable Rufus E. Foster, judge of the United States District Court for the Southern District of New York, or one of the other judges of the United States District Court for the Southern District of New York, at the courthouse, held at Room 331 of the Federal & Post Office Building, Manhattan Borough, New York City, on October 25, 1922, at 10.30 o'clock in the forenoon of that day, to do and receive what shall then and there be considered concerning him, and have you then and there this writ.

Witness, Honorable Learned Hand, the 24th day of October, 1922.

ALEX GILCHRIST,
Clerk.

MAXWELL ARENT,
Attorney,
Office and P. O. Address, 63 Park Row, New York City.

Writ allowed Oct. 24, 1922.

LEARNED HAND,
U. S. D. J.

2 In United States District Court.

Petition for writ of habeas corpus.

Filed Oct. 24, 1922.

To Honorable Rufus E. Foster, judge of the United States District Court for the Southern District of New York:

The petition of John Valente shows that

1st. That your petitioner is imprisoned or restrained in his liberty in the city prison (Tombs Prison), Center Street, New York City.

2d. That he has not been committed, and is not detained by virtue of any judgment, decree, final order, or process specified in section 2016 of this act, or by virtue of any judgment, decree, final order, or process of the United States of America.

3d. The cause or pretence of the imprisonment or restraint, according to the best knowledge and belief of the petitioner, is that the said petitioner was illegally and improperly sentenced to serve a term of thirty (30) days in the aforesaid city prison by Honorable John C. Knox, one of judges of the United States District Court for the Southern District of New York, on the 6th day of October, 1922, after a trial and conviction in the said court. The

trial, up to the rendition of the verdict, was held before Judge Grubb of the United States District Court, and a jury. The verdict was received and the sentence was imposed by the aforesaid Judge Knox. The receipt of the jury's verdict by Judge Knox and the imposition of sentence by him was in violation of the constitutional rights and privileges of your petitioner, and the said Judge Knox had no jurisdiction to receive the verdict and to impose said sentence.

Wherefore your petitioner prays that a writ of habeas corpus issue directed to Warden Hanley, warden of the Tombs Prison, City of New York, commanding him to produce the body of John Valente before the Honorable Rufus E. Foster, judge of the United States District Court for the Southern District of New York, or one of the other judges of the United States District Court for the Southern District of New York, at the courthouse, held at Room 331 of the Federal and Post Office Building, Manhattan Borough, New York City, on October 25, 1922, at 10.30 o'clock in the forenoon of that day.

Dated the 23rd day of October, 1922.

JOHN VALANTE.

SOUTHERN DISTRICT OF NEW YORK,
State, City & County of New York, ss:

John Valente, being duly sworn, doth depose and say, that the facts set forth in the above petition, subscribed by him, are true.

Sworn before me this 23rd day of October, 1922.

MAX POMERANTZ,
Notary Public, New York County, No. 296,
New York Co. Register No. 4283.

My commission expires Mar. 30, 1924.

[File endorsement omitted.]

3 UNITED STATES DISTRICT COURT,
Southern District of New York:

Return to writ of habeas corpus.

UNITED STATES OF AMERICA, EX REL., JOHN VALANTE, RELATOR,
against
JOHN HANLEY, AS WARDEN OF THE CITY PRISON, NEW YORK CITY,
respondent.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

William C. Hecht, being duly sworn, deposes and says that he is the United States marshal for the Southern District of New York.

On October 16, 1922, under an order of commitment made by a judge of the United States District Court, Southern District of New York, deponent took into his custody the above named defendant, John Valante. Thereafter, said defendant was duly delivered into the custody of the warden of city prison, city of New York, as directed in said order of commitment.

Annexed hereto and made a part hereof is the return of said warden of city prison, New York City, showing the discharge of said defendant from custody upon the order of the Honorable Rufus E. Foster, United States District Judge.

Annexed hereto and made a part hereof is the affidavit of Elmer H. Lemon, special assistant United States attorney, setting forth the facts in this proceeding.

Respondent denies any knowledge or information thereof sufficient to form a belief as to the truth of the allegations in the petition herein, except as to what is admitted in the return filed herewith.

Wherefore, deponent prays that the writ of habeas corpus herein be dismissed and the said defendant remanded to the custody of the warden of the city prison, city of New York, to be dealt with in accordance with said sentence of the court.

WILLIAM C. HECHT.

Sworn to before me this 31st day of October, 1922.

SAMUEL HITCHCOCK,
U. S. Commissioner, S. D. of N. Y.

4 (Copy.)

Return of warden of city prison.

The undersigned, warden of city prison, respectfully returns and says, that he received the annexed papers marked "A", on the 24th day of Oct. A. D. 1922, at — o'clock p. m., at which time there was in the city prison, of which he is warden, the body of John Valante, whom he believes to be the person named in said paper marked "A", and who was so there under custody as being the person named in an original paper of which the annexed paper marked "B" is a copy (and the original whereof he now produces).

And so returning, the undersigned produces the body of said person in obedience to the command expressed in paper "A".

JOHN HANLEY
Warden of City Prison.

New York, the 30th day of Oct. 1922.

Prisoner produced in ct. and commitment indorsed as follows: Deft. ordered released from custody. Warden, N. Y. City Prison. (Sgd.) Rufus E. Foster, U. S. D. J., Oct. 25, 1922.

5 United States District Court, Southern District of New York.

Return to writ of habeas corpus.

Filed Oct. 31, 1922.

[Title omitted.]

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Elmer H. Lemon, being duly sworn, deposes and says that he is a special assistant United States attorney for the Southern District

of New York and is in charge of this proceeding. That deponent also had charge of the action of United States of America vs. John Valante, and has knowledge of the facts in such action. That this affidavit is made by deponent because of his knowledge of said action, and of his knowledge of this proceeding, and is attached to the return herein for the purpose of setting forth all the facts in the matter.

It is respectfully urged that the petition upon which this writ was granted is insufficient in law and that the writ should therefore be quashed for the following reasons:

Heretofore, and during the April term of the United States District Court in and for the Southern District of New York, informations were duly filed in said court by the United States attorney for the Southern District of New York, leave having been first had and obtained, which informations charged the defendant with unlawfully, wilfully and knowingly maintaining a common nuisance at Number 856 First Avenue, New York City, on
6 April 14, 1922, and also with possessing and selling intoxicating liquor at said time and place. On April 17, 1922, the defendant, John Valante, duly appeared in the United States District Court, Southern District of New York, and entered pleas of not guilty to each of the three informations above mentioned.

On June 22, 1922, Honorable William H. Taft, Chief Justice of the United States, duly designated Honorable William I. Grubb, District Judge of the United States District Court for the Northern District of Alabama, to hold a District Court in the Southern District of New York, which designation follows:

"Honorable WILLIAM I. GRUBB,
District Judge U. S. District Court,
Birmingham, Alabama.

SIR: The senior circuit judge of the Second Circuit having certified that on account of the accumulation and urgency of business in the District Court for the Southern District of New York it is impracticable to designate and appoint a sufficient number of district judges of other districts within said circuit to relieve such accumulation and urgency of business, and your consent in writing to be designated and appointed to sit in the District Court for the Southern District of New York during the period beginning September 1, 1922, and ending October 16, 1922, and for such further time as may be required to complete unfinished business, having been duly signed and exhibited to me, and the senior circuit judge of the Fifth Circuit having certified that the business of the Northern District of Alabama will not suffer by such designation, now, therefore, pursuant to the authority vested in me by chapter 1, section 18 of the Judicial Code, as amended by the act of Congress approved October 3, 1913, inasmuch as in my judgment the public interests so require, I do hereby designate and appoint you to hold a District Court in the Southern District of New York within the said Second

Circuit during the period beginning September 1, 1922, and ending October 16, 1922, and for such further time as may be required to complete unfinished business, and to have and exercise within the said district to which you are so assigned the same powers that are vested in the judge thereof.

Dated, Washington, D. C., June 22, 1922.

WM. H. TAFT,
Chief Justice of the United States."

7 On October 6, 1922, District Judge William I. Grubb duly held a term of court in the District Court of the United States, Southern District of New York, at the Federal Court House, Borough of Manhattan, City of New York. At said time and place the defendant John Valante duly appeared for trial and was tried before said Judge William I. Grubb and a jury. A copy of the minutes of said trial follows:

FRIDAY, OCT. 6, 1922.

Wm. I. Grubb, J.

UNITED STATES OF AMERICA
vs.
JOHN VALANTE.

Elmer Lemon, assistant U. S. attorney.
Abner Siegel, attorney for defendant.
(Names of jurors.)
Trial begun.
Mr. Lemon opens to the jury.
Evidence for Government.
John J. Mannix, Edward McCann, Joseph W. Quillan called, etc.
Government exhibits:
1 bottle of whiskey.
2 bottles of "
Government rests and Mr. Siegel opens to jury.
Evidence for defendant.
John Valante called, etc.
Defendant rests.
John J. Mannix recalled and Edward McCann recalled.
"Both sides rest. Motion to dismiss, etc., denied. Both sides sum up. Charge. Jury retire. Jury return. Verdict. Guilty. Thirty days. New York City Prison. Paroled until Oct. 9, 1922, 10½ a. m, before Knox, D. J. Defendant, in presence of Judge Knox, by Abner Siegel, attorney, consents to the receiving of a verdict by Judge Knox."

The above trial was concluded and the jury retired to deliberate at 12.15 p. m. Judge William I. Grubb awaited the return
8 of the jury until 1.30 p. m., when he stated that he was leaving the jurisdiction of the court and was to return to

his home in Alabama the same afternoon and it was necessary for him to leave the court house. Whereupon, the following stipulation was entered into and placed upon the record of the court in the presence of the defendant:

"(At 1.30 p. m., the jury not having agreed upon a verdict, it was agreed by both counsel, that, in the absence of Judge Grubb, any other Federal judge may receive the verdict and impose sentence, if necessary, with the same force and effect as though said Federal judge had presided in place and stead of Judge Grubb)."

After the entry of said stipulation upon the minutes of the court, Judge Grubb left the court house and returned to the State of Alabama.

Honorable John C. Knox is a United States district judge, duly designated to sit in the southern district of New York. At the time Judge Grubb left the jurisdiction said Judge Knox was consulted and consented to receive the verdict of the jury when rendered.

At about 3 o'clock p. m. the jury returned into court, whereupon the following proceedings were had:

"The court convened at 2.45 p. m.

Judge John C. Knox presides for the purpose of receiving the verdict under the foregoing stipulation.

The jury returned at 2.45 p. m. and rendered a verdict against the defendant of guilty as charged.

Mr. Lemon moved for the imposition of immediate sentence.

Mr. SIEGAL. I do not know whether your honor has the right to take this verdict despite this stipulation.

The COURT. I think I will sentence him now. Anything to say on the merits of the case?

Mr. SIEGAL. I want to say this, your honor. I do not think the defendant is guilty. The jury, of course, disagrees with me and found him guilty. Of course, your honor, if he felt he was
9 guilty, and if I thought he was guilty, I would not have permitted him to stand trial; I would have let him take a plea and you would have given him a hundred dollar fine. He couldn't pay it.

The COURT. This man is married?

The DEFENDANT. Yes.

The COURT. Children?

The DEFENDANT. Three.

The COURT. How old?

The DEFENDANT. One seven years, one four years, and one two years.

The COURT. I will sentence you to thirty days.

Mr. SIEGAL. I formally move for an arrest of judgment on the ground the court has no right to impose sentence in this case. I ask your honor to fix the bail on the appeal, and I will take the question up.

(The present bail bond is continued.)

The court suspends the execution of judgment until Monday morning, meanwhile the bail remaining as at present.

Thereafter defendant was duly surrendered to the United States marshal's office for the purpose of serving the sentence imposed by the court, and entered upon the serving of said sentence on October 16, 1922. The respondent denies any knowledge or information thereof sufficient to form a belief as to the truth of the allegations of the petition herein, except as to what is admitted in the return filed herein.

Wherefore deponent prays that the writ of habeas corpus herein be dismissed and the said defendant remanded to the custody of the warden of the city prison, city of New York, to be dealt with in accordance with said sentence of the court.

Sworn to before me this 30th day of October, 1922.

[SEAL.] CARL BRECHER,
Notary Public, &c.

[File endorsement omitted.]

10 At a stated term of the District Court of the United States for the South District of New York, held at the United States Courts and Post Office Building, Borough of Manhattan, city and County of New York, on October 31, 1922.

Order sustaining writ.

Filed October 31, 1922.

Present: Honorable Rufus E. Foster, United States district judge.

[Title omitted.]

The above-entitled matter having come on to be heard before me at the above time and place, and after reading and filing the petition for writ of habeas corpus and the writ annexed thereto in support of said application, and the return to said writ made by the warden of city prison, city of New York, with the affidavits of William C. Hecht, United States marshal for the southern district of New York, and Elmer H. Lemon, special assistant United States attorney thereto annexed, in opposition to said application, and after hearing Maxwell Arent, Esq., with Abner Siegel, Esq., of counsel for the application, and Elmer H. Lemon, special assistant United States attorney, opposed, and due deliberation having been had, now on motion of Maxwell Arent, attorney for the petitioner, it is

Ordered, that said petition be granted and said writ of habeas corpus sustained, and said John Valante be, and he hereby is, released from custody, and John Hanley, warden of the city prison, city of New York, is hereby ordered to release said relator.

RUFUS E. FOSTER,
U. S. D. J.

Dated: New York, October 31, 1922.

[File endorsement omitted.]

11 Form 10 4698E
AH

United States District Court, Southern District of New York.

Information.

Filed Apr. 15, 1922.

Of the April term in the year of our Lord, one thousand nine hundred and twenty-two.

Now comes William Hayward, United States attorney for the Southern District of New York, leave having been first had and obtained, and respectfully informs the court that heretofore, to wit, on the 14th day of April one thousand nine hundred and twenty-two, in the Southern District of New York and within the jurisdiction of this court, John Valante unlawfully, wilfully, and knowingly did maintain a common nuisance at, in, and upon the store, basement, cellar, room, house, building, and place more particularly designated and described as follows: 856 First Avenue, New York City, where intoxicating liquor, to wit, whiskey, containing more than one-half of one per cent of alcohol by volume, and fit for use for beverage purposes, was sold, kept, and bartered in violation of Title II of the national prohibition act; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Title II, act of October 28, 1919.)

12 Form 11a 4698E
AH

Second count.

And William Hayward, the United States attorney aforesaid, further informs the court that heretofore, to wit, on the 14th day of April in the year of our Lord one thousand nine hundred and twenty-two, at and within the Southern District of New York, and within the jurisdiction of this court, John Valante unlawfully, wilfully, and knowingly did possess in fruit store at 856 First Avenue, New York City, a quantity of intoxicating liquor, to wit, about ¾ quart whiskey, which then and there contained more than one-half of one per cent of alcohol by volume, and which was then and there fit for use for beverage purposes; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Title II, act of October 28, 1919.)

13 Form 11a 4698E
AH

Third count.

And William Hayward, the United States attorney aforesaid, further informs the court that heretofore, to wit, on the 14th day of April in the year of our Lord one thousand nine hundred and twenty-two, at and within the Southern District of New York and within the jurisdiction of this court, John Valante unlawfully, wilfully, and knowingly did sell a quantity of intoxicating liquor, to wit, 2 glasses of whiskey, to John J. Mannix, which then and there contained more than one-half of one per cent of alcohol by volume, and which was then and there fit for use for beverage purposes; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Title II, act of October 28, 1919.)

WILLIAM HAYWARD,
United States Attorney.

Endorsed: Apr. 17, 1922. Deft. pleads not guilty. Grubb, D. J. Oct. 6, 1922. Trial. Verdict guilty. 30 days New York City Prison. Paroled until Oct. 9th, ten thirty a. m. before Knox, J.
[File endorsement omitted.]

14 At a stated term of the United States District Court for the Southern District of New York, held at the United States Court Rooms, in the Borough of Manhattan, City of New York, on the day of Oct. 6th, 1922, in the year of our Lord one thousand nine hundred and twenty—

Commitment.

Filed Nov. 29, 1922.

Present: The Honorable John C. Knox, Judge.
[Title omitted.]
31/343. Unlawfully, wilfully, and knowingly sell a certain quantity of intoxicating liquor which contained more than one-half of one per cent of alcohol by volume and was then an' there fit for use for beverage purposes. Act of Oct. 28, 1919.
On motion of the United States attorney, ordered sentence.
The court thereupon proceeded to pass judgment, and sentenced the prisoner, John Valante, to be imprisoned for a term of thirty days.
Sentence to be executed at the N. Y. City Prison.
Deft. paroled until Oct. 16, 1922, 10½ a. m.
An extract from the minutes.
[SEAL.] ALEX. GILCHRIST, Jr.,
L. *Clerk.*

[File endorsement omitted.]

15 United States District Court, Southern District of New York.

Petition for appeal.

Filed Jan. 31, 1923.

[Title omitted.]

To the Honorable John C. Knox, United States District Judge, Southern District of New York.

Now comes the petitioner, United States of America, and respectfully represents that on the 31st day of October, 1922, an order was entered by this court sustaining a writ of habeas corpus in the above matter, and directing the discharge of the above-named John Valante from the custody of the warden of the city prison, New York City, as from said order will more fully appear.

And your petitioner, being desirous of securing a review of said order in the United States Supreme Court, respectfully prays that an appeal may be duly allowed it from said order of the United States District Court for the Southern District of New York, to the United States Supreme Court, in accordance with law.

Assignment of errors is hereto attached, dated January 31, 1923.

(Signed) WILLIAM HAYWARD,
United States Attorney for the Southern District of New York, Attorney for Petitioner.

[File endorsement omitted.]

16 At a stated term of the United States District Court for the Southern District of New York held at the Federal Building in the city of New York on the 31st day of January, 1923.

Order allowing appeal.

Filed Jan. 31, 1923.

Present: Honorable John C. Knox, United States district judge.

[Title omitted.]

On reading the petition of the petitioner, United States of America, by William Hayward, United States attorney, for the allowance of an appeal from the order of the United States District Court for the Southern District of New York, entered on the 31st day of October, 1922, sustaining the writ of habeas corpus herein and discharging John Valante from the custody of John Hanley, warden of the city prison, New York City, it is

Ordered, that an appeal be and the same is hereby allowed to the said United States of America from the order of the United States District Court for the Southern District of New York to the United States Supreme Court, as prayed for in said petition; it is

Further ordered, that the time within which the petitioner shall file this record in the Supreme Court of the United States be and the same is hereby extended to March 31, 1923.

(Signed) JNO. C. KNOX,
United States District Judge.

[File endorsement omitted.]

17 United States District Court, Southern District of New York.

Assignment of errors.

Filed Jan. 31, 1923.

[Title omitted.]

And now comes the petitioner, the United States of America, by William Hayward, United States attorney for the Southern District of New York, its attorney, and in connection with its petition for an appeal says that in the record and proceedings and judgment aforesaid error has intervened to its prejudice, to wit:

First: The court erred in not holding that said John Valante was rightfully held and legally imprisoned;

Second: The court erred in granting said petition and in sustaining the writ of habeas corpus, and in releasing said John Valante from the custody of the warden of the city prison, New York City;

Third: The court erred in holding that the United States Court for the Southern District of New York, presided over by Judge John C. Knox, was not constitutionally convened;

Fourth: The court erred in holding that the United States district judge, John C. Knox, had no power or jurisdiction to impose sentence upon said John Valante.

By reason whereof this petitioner and appellant prays that said order may be reversed and that the said John Valante may be remanded to the custody of the United States marshal for the Southern District of New York, as provided by law.

(Signed) WILLIAM HAYWARD,
United States Attorney for the Southern District of New York, Attorney for Petitioner-Appellee.

[File endorsement omitted.]

18 *Citation and service.*

Filed Feb. 1, 1923.

By the Honorable John C. Knox, one of the judges of the District Court of the United States for the Southern District of New York, to John Valante, appellee, greeting:

You are hereby cited and admonished to be and appear at the United States Supreme Court, at Washington, D. C., within thirty

days from the date of this writ, pursuant to an appeal duly allowed by the Hon. John C. Knox, United States district judge for the Southern District of New York, and filed in the clerk's office of said court on the 31st day of January, 1923, in a cause wherein the United States of America is appellant and you are appellee, to show cause, if any, why the order rendered against the said appellant as in said appeal mentioned should not be corrected, and why speedy justice should not be done to the party in that behalf.

Witness, the Honorable William H. Taft, Chief Justice of the United States, the 31st day of January, in the year of our Lord one thousand nine hundred and twenty-three.

JNO. C. KNOX,
United States District Judge for the Southern District of New York.

19 Due service of a copy of the within is hereby admitted.
New York, January 31, 1923.

MAXWELL ARENT,
Attorney for John Valante.

U. S. District Court, S. D. of N. Y. Filed Feb. 1, 1923.

20 *Clerk's certificate.*

UNITED STATES OF AMERICA,
Southern District of New York, ss:

[Title omitted.]

I, Alexander Gilchrist, Jr., clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the Southern District of New York, this thirteenth day of February, in the year of our Lord one thousand nine hundred and twenty-three, and of the Independence of the said United States the one hundred and forty-seventh.

[SEAL.] ALEX. GILCHRIST, Jr.,
Clerk.

(Indorsed on cover:) File No. 29,401. S. New York. D. C. U. S. Term No. 218. The United States of America, appellant, vs. John Valante. Filed February 14th, 1923. File No. 29401.

○

RECEIVED
FEB 18 1964
SUPREME COURT, U.S.

No. 215.

In the Supreme Court of the United States

OCTOBER TERM, 1963

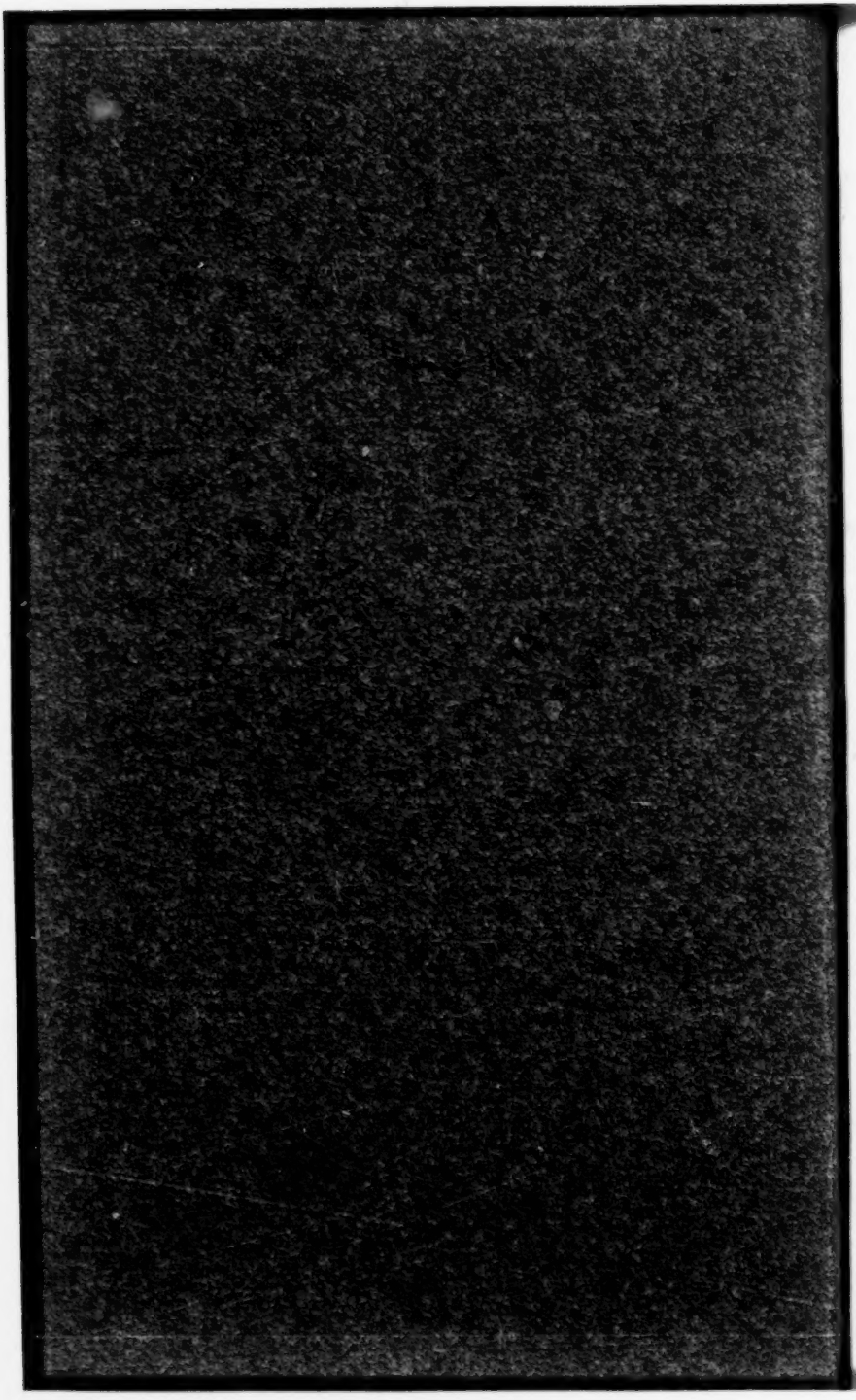
THE UNITED STATES OF AMERICA, APPELLANT,

v.

[illegible]

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE [illegible] DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES



INDEX.

	Page.
Statement of the Case	1
Assignments of Error	3
Argument:	
I. Valante was not deprived of a trial by jury	4
The issue	5
Trial by jury	6
The leading authorities	7
In prosecutions for misdemeanor trial by jury may be waived	10
Distinction between felonies and misdemeanors	17
The irregularity in this case did not amount to a waiver of trial by jury	18
Many irregularities may be waived	22
The day of technicality is past	24
II. Habeas corpus was not the proper method of review	30
Conclusion	31

AUTHORITIES.

Cases:	
Brown v. *State*, 63 Ala. 97	20
Bullock v. *Neal*, 42 Ark. 278	19
Callan v. *Wilson*, 127 U. S. 540	12
Cancemi v. *People*, 18 N. Y. 128	14, 16, 23
Capital Traction Company v. *Hof*, 174 U. S. 1	6, 7
Clanton v. *State*, 96 Ala. 111	22
Commonwealth v. *Beard*, 48 Pa. Superior Ct. 319	5, 9, 15, 18, 25, 30, 32
Commonwealth v. *Dailey*, 12 Cush. (Mass.) 80	5, 8, 17, 22
Craig v. *Hecht*, 82 Oct. Term, 1923 (Nov. 19, 1923)	31
Crain v. *United States*, 162 U. S. 625	27
Dickinson v. *United States*, 159 Fed. 801	8, 10, 13
Dunlap, Ex parte, 5 Alaska 521	8
Freenan v. *United States*, 227 Fed. 732	8, 21, 27
Garland v. *Washington*, 232 U. S. 642	28
Glasgow v. *Moyer*, 225 U. S. 420	31
Gregory, Matter of, 219 U. S. 210	31
Harlan v. *McGourin*, 218 U. S. 442	31
Hurtado v. *California*, 110 U. S. 516	27
Johnson v. *Southern Pacific Company*, 196 U. S. 1	27
King v. *Sutton*, 8 B. & C. 417	13
Lamphere v. *State*, 114 Wis. 193	22
Ledgewood v. *State*, 134 Ind. 81	22

Cases—Continued. Page.
Low v. *United States*, 169 Fed. 86 ... 8
Maxwell v. *Dow*, 176 U. S. 581 ... 7
Murphy v. *Commonwealth*, 1 Metc. (Ky.) 365 ... 18
Parks, Ex parte, 93 U. S. 18 ... 31
Pennsylvania Hall, In re, 5 Pa. 204 ... 18
People v. *Felix*, 45 Cal. 163 ... 22
People v. *Henderson*, 28 Cal. 465 ... 20
People v. *Reilly*, 53 Mich. 260 ... 22
Peterson, Ex parte, 253 U. S. 300 ... 29
Queen v. *Sullivan*, 8 A. & E. 831 ... 13
Queenan v. *Oklahoma*, 190 U. S. 548 ... 23, 32
Sarah v. *State*, 28 Ga. 576 ... 17
Schick v. *United States*, 195 U. S. 65 ... 8, 13
Smith v. *Times Publishing Co.*, 178 Pa. 481 ... 19
State v. *Austin*, 108 N. C. 780 ... 20
State v. *Borowsky*, 11 Nev. 119 ... 17
State v. *Cottrill*, 31 W. Va. 162 ... 9
State v. *Cox*, 8 Ark. 436 ... 17
State v. *Kaufman*, 51 Iowa, 578 ... 15
State v. *Keehn*, 85 Kansas, 765 ... 10, 20, 21
Thompson v. *Utah*, 170 U. S. 343 ... 6, 12
Turbeville v. *State*, 56 Miss. 793 ... 18
Tyra v. *Commonwealth*, 2 Metc. (Ky.) 1 ... 17
United States v. *Lacher*, 134 U. S. 624 ... 27
United States v. *Praeger*, 149 Fed. 474 ... 7
United States v. *Taylor*, 11 Fed. 470 ... 7
Virch, In re, 5 Alaska, 500 ... 8
Warren v. *Commonwealth*, 37 Pa. 45 ... 18
Watkins, Ex parte, 3 Pet. 193 ... 31

Texts:
12 Cyc. 769 ... 22
Columbia Law Review, Vol. 8, p. 577 ... 10
Lawyers Reports Annotated—Note Vol. 11, New Series, 1136 ... 18
Moschzisker on Trial by Jury, Secs. 392–394 ... 19
Thompson on Trials, Sec. 6 ... 17
Trial by Jury and the Reform of Civil Procedure, 31 Harv. Law Rev. 669 ... 19

Constitution of the United States:
Art. III, Sec. 2, Cl. 3 ... 3, 5
Sixth Amendment ... 3
Seventh Amendment ... 3

Statutes:
Judicial Code, Sec. 238 ... 3
National Prohibition Act, 41 Stat. 305, c. 85 ... 4

In the Supreme Court of the United States.

OCTOBER TERM, 1923.

THE UNITED STATES OF AMERICA,
Appellant,
v.
JOHN VALANTE.
} No. 218.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This is an appeal by the United States from a judgment of the District Court of the United States for the Southern District of New York, which discharged upon habeas corpus one John Valante, who had been tried, convicted, and sentenced in that court to imprisonment for thirty days for violation of the National Prohibition Act. It involves the constitutional validity of the sentence imposed upon him and the propriety of the writ of habeas corpus to test it.

In October, 1922, Honorable William I. Grubb, District Judge of the United States District Court for the Northern District of Alabama, was duly

appointed to hold a district court in the Southern District of New York. There came before him for trial on October 6, John Valante, the appellee in this case. Judge Grubb sat throughout the taking of the testimony and delivered his charge to the jury, which retired to deliberate at 12.15 p. m. At 1.30 p. m. it had not yet returned, and as Judge Grubb had arranged to leave New York City for his home in Alabama during the afternoon, he consulted with counsel and with other members of the court, and the following stipulation was entered into (R. 6):

> At 1.30 p. m., the jury not having agreed upon a verdict, it was agreed by both counsel that, in the absence of Judge Grubb, any other Federal judge may receive the verdict and impose sentence, if necessary, with the same force and effect as though said Federal judge had presided in place and stead of Judge Grubb.

At 2.45 p. m. the jury returned to the court room, and, in accordance with the stipulation, Hon. John C. Knox, a United States district judge for the Southern District of New York, presided. He received the verdict of "Guilty" which the jury returned, and was about to impose sentence when counsel for Valante objected that he had no power to receive the verdict or to impose sentence. (R. 6.) Thereupon proceedings in the case were suspended until October 9. Valante was then sentenced by Judge Knox to imprisonment for thirty days.

A few days after his commitment Valante obtained a writ of habeas corpus from Judge Foster of the District Court, who, after hearing, directed that he be discharged from custody. (R. 7.) From this judgment the United States has appealed to this court.

The appeal comes directly here under Section 238 of the Judicial Code, because it is a case which "involves the construction or application of the Constitution of the United States." The petition filed in the court below averred, inter alia, that "the receipt of the jury's verdict by Judge Knox and the imposition of sentence by him was in violation of the constitutional rights and privileges of your petitioner * * *." (R. 2.) Although the court below wrote no opinion, it is evident from the record that the order for discharge was made because the court was of opinion that Valente had been deprived of a trial by jury, contrary to Article III, Section 2, Clause 3, and the Sixth and Seventh Amendments of the Constitution of the United States.

ASSIGNMENTS OF ERROR.

The United States, appellant, relies upon the second, third, and fourth assignments of error, which are as follows (R. 11):

Second. The court erred in granting said petition and in sustaining the writ of habeas corpus, and in releasing said John Valante from the custody of the warden of the city prison, New York City;

Third. The court erred in holding that the United States Court for the Southern District of New York,

presided over by Judge John C. Knox, was not constitutionally convened;

Fourth. The court erred in holding that the United States district judge, John C. Knox, had no power or jurisdiction to impose sentence upon said John Valante.

These three assignments present two questions:

1. Whether John Valante was deprived of a trial by jury (third and fourth assignments or error), and

2. Whether the District Court upon habeas corpus could question the validity of the sentence imposed and could discharge the relator (second assignment).

ARGUMENT.

I.

Valante was not deprived of a trial by jury.

This appeal presents a question never before considered or decided by this court, nor, so far as we can discover, by any Federal court. It concerns the ancient institution of trial by jury, and involves, as we believe, an important principle.

The prosecution was for a misdemeanor. (National Prohibition Act, 41 Stat. 305, c. 85, Title I, Sec. 3, and Title II, Secs. 3 and 29.) After all the evidence had been presented, the jury had received its instructions and had retired to deliberate, the judge who had presided at the trial was obliged to leave, and, with the consent of the defendant, he was replaced by another duly qualified judge of the same court who received the verdict and imposed

sentence. Did this substitution of judges *with the defendant's consent* deprive him of a trial by jury?

The Issue.

It will be urged by the Appellee that the constitutional provision that "The trial of all crimes, except in cases of impeachment, shall be by jury" (Article III, Section 2, Clause 3) is mandatory and can not be waived; that a presiding judge is an essential element of such trial; that the same judge must continue throughout the trial; and that the trial is not concluded until the verdict has been received, the sentence imposed, and the judgment entered.

On behalf of the Government we shall contend that the question whether a jury trial may be waived is not directly involved in the case, but only the question whether a minor technical irregularity incident to the conduct of such a trial may be waived; or, as it is put in some of the cases, whether the defendant "may stipulate beforehand, on the record, that he will take no exception to such irregularity, and if he does, whether the court can not legally act upon it, and carry such stipulation into effect." (Shaw, C. J., in *Commonwealth* v. *Dailey*, 12 Cush. (Mass.) 80, 81; *Commonwealth* v. *Beard*, 48 Pa. Superior Ct. 319, 325.) And to this we answer in the language of Chief Justice Shaw in the case cited (p. 82), "We think they can."

Trial by jury.

In *Capital Traction Company* v. *Hof* (174 U. S. 1, 15) Mr. Justice Gray quoted the following comprehensive definition of trial by jury from an opinion rendered to the House of Representatives by the Supreme Judicial Court of New Hampshire (Opinion of Justices, 41 N. H. 550, 551):

> The terms "jury" and "trial by jury" are, and for ages have been, well known in the language of the law. They were used at the adoption of the Constitution, and always, it is believed, before that time, and almost always since, in a single sense. A jury for the trial of a cause was a body of twelve men, described as upright, well-qualified, and lawful men, disinterested and impartial, not of kin nor personal dependents of either of the parties, having their homes within the jurisdictional limits of the court, drawn and selected by officers free from all bias in favor or against either party, duly impaneled under the direction of a competent court, sworn to render a true verdict according to the law and the evidence given them; who, after hearing the parties and their evidence, and receiving the instructions of the court relative to the law involved in the trial, and deliberating, when necessary, apart from all extraneous influences, must return their unanimous verdict upon the issue submitted to them.

This Court has held that a body of twelve men is essential, fewer will not suffice (*Thompson* v. *Utah*,

170 U. S. 343, 349); that they must be presided over by a judge duly authorized and qualified to determine questions of law as they arise and to instruct them as to the law and the facts before they deliberate (*Capital Traction Co.* v. *Hof*, 174 U. S. 1, 13); and that the verdict must be the unanimous opinion of all (*Maxwell* v. *Dow*, 176 U. S. 581, 586). But it has not heretofore been called upon to determine whether a trial by jury in the Federal courts may be waived, nor to decide what irregularities occurring in the course of a trial are so fundamental as to amount to a deprivation of the ancient right.

These questions have, however, been met in several cases in the lower Federal courts and in a multitude of cases in the several State courts. We shall not cite many of them, nor attempt to harmonize the reasoning or reconcile the conclusions reached, for they are in hopeless conflict. In frankness to this Court, however, we shall refer to the leading cases on both sides in which the reasons and authorities pro and con may be found.

The leading authorities.

In the Federal courts we find six cases:

In *United States* v. *Praeger*, 149 Fed. 474, it was held by the District Court for the Western District of Texas that a defendant charged with a misdemeanor might waive a trial by jury. A dictum to the contrary will be found in *United States* v. *Taylor*, 11 Fed. 470.

In *Dickinson* v. *United States*, 159 Fed. 801, it was held by the Circuit Court of Appeals for the first circuit that a defendant charged with an "infamous crime," though not a felony, could not waive his right to a trial by twelve jurors nor consent to a verdict by ten of them. In this case, however, Judge Aldrich wrote an elaborate dissenting opinion which, we think, contains the better reason (p. 812).

In *Low* v. *United States*, 169 Fed. 86, a prosecution for a felony, it was held by the Circuit Court of Appeals for the sixth circuit that a trial by jury could not be waived.

In *Freeman* v. *United States*, 227 Fed. 732, which was a trial for a felony, the Circuit Court of Appeals for the second circuit concluded that the defendant could not consent to the substitution of another judge in the midst of the trial after more than a hundred witnesses for the Government had been heard and before the defendant had opened his case.

And in two cases recently decided in the first and third divisions of the District of Alaska opposite conclusions were reached. *In re Virch*, 5 Alaska, 500, and *Ex parte Dunlap*, 5 Alaska, 521.

In the State courts we find the case of *Commonwealth* v. *Dailey*, 12 Cush. (Mass.) 80, where it was held that a defendant in a prosecution for a misdemeanor might consent to the withdrawal of one of the jurors and the return of a verdict by the remaining eleven. This case was subsequently cited and approved by this Court in *Schick* v. *United States*, 195 U. S. 65, 72.

State v. *Cottrill*, 31 W. Va. 162, was a prosecution for a misdemeanor. The Constitution of West Virginia provided that "Trial of crimes and misdemeanors, unless herein otherwise provided, shall be by a jury of twelve men." A statute provided that in misdemeanors, with consent of the defendant, trial might be by the court without a jury. The defendant had elected to be tried by the court, and after an unfavorable verdict took the position that he had no power to waive a jury trial. The case thus presented the question whether his waiver was valid, and whether the statute which purported to authorize it was in conflict with the constitution. It will be noted in passing that the language of the constitutional provision, like that contained in the Federal Constitution, is mandatory in form. The court, which was composed of four judges, was equally divided and exhaustive opinions were delivered on each side.

In a more recent case in Pennsylvania it was held by the Superior Court that in case of a misdemeanor a defendant might validly consent to a verdict of eleven jurors. The point was affirmed upon the opinion of Judge Endlich, of the court below, who enjoys a reputation in that State as one of its most able jurists. We commend the opinion of Judge Endlich to the careful consideration of this court. (*Commonwealth* v. *Beard*, 48 Pa. Superior Ct. 319.)

The Supreme Court of Kansas, in an able opinion in *State* v. *Keehn*, 85 Kansas, 765, which was a murder case, held that the defendant might consent to have the verdict taken by a member of the bar where the absence of the trial judge was unavoidable and the defendant had given his consent in open court.

Inspired by the case of *Dickinson* v. *United States*, supra, there appeared in Vol. 8, Columbia Law Review, 577, an article which discusses a number of the leading cases.

These authorities, and a few which we shall cite hereafter, have canvassed the entire field of legal learning on the subject. Some of the cases have involved the right to waive a trial by jury entirely and to submit to a trial by the court, others the right to consent to the withdrawal of one or more jurors during the course of the trial, others to the substitution of a judge during the taking of the testimony, others to the temporary absence of the judge during the taking of testimony or the argument of counsel, and a very few involve the right to consent, as in the instant case, to a substitution of judges after the jury had retired to deliberate and before the verdict was received.

In prosecutions for misdemeanor trial by jury may be waived.

If the question here presented were whether a defendant in a prosecution for a misdemeanor might waive a trial by jury, we think the better reason would lead to an affirmative conclusion. The con-

trariety of opinion in the several courts is due to two distinct and different conceptions of the constitutional guaranty. One—that it is a right or privilege placed there for the protection of the individual, to which the maxim *Quilibet potest renunciare juri pro se introducta* applies; and the other—that a jury is part of the judicial framework of the government essential to the jurisdiction of the tribunal to which the Constitution has granted power to try criminal cases.

We have found but three reasons advanced in support of the view that a jury trial can not be waived:

(1) That the constitutional provision is so located in that instrument as to indicate that trial by jury is an integral part of the structure of the Government, (2) that its mandatory language precludes the possibility of waiver, and (3) that waiver by a defendant would be contrary to public policy. We shall briefly consider each of them.

(1) It is said that inasmuch as the constitutional provision occurs in the body of the Constitution and not in the Amendments, trial by jury in criminal cases was intended as part of the framework of the government, and therefore can not be set aside by the consent of a defendant. This assumes that the whole of the Constitution as originally adopted was concerned with the construction of the machinery of government and that none of it was designed especially for the protection of private rights; an

assumption which is clearly contrary to the fact. The Constitution as originally adopted preserved the writ of habeas corpus, prohibited bills of attainder and ex post facto laws, forbade the States by law to impair the obligation of contracts, provided that two witnesses to an overt act should be necessary to sustain a conviction of treason, forbade a religious test as a qualification for office and preserved to the citizens of each State the privileges and immunities of citizens in the several States. None of these have to do with the framework of the Government. All are designed to protect the individual. The argument based upon its position is, therefore, unsound.

(2) It is urged, however, that the language is mandatory "The trial of all crimes * * * shall be by jury," and it can not therefore be treated as *lex pro se introducta* and waived by a defendant. To this we say in the language of this Court in *Callan* v. *Wilson*, 127 U. S. 540, 549,

> In our opinion, the provision is to be interpreted in the light of the principles which, at common law, determined whether the accused, in a given class of cases, was entitled to be tried by a jury.

and in *Thompson* v. *Utah*, 170 U. S. 343, 350,

> It must consequently be taken that the word "jury" and the words "trial by jury" were placed in the Constitution of the United States with reference to the meaning affixed to them in the law as it was in this country

and in England at the time of the adoption of that instrument.

In England at common law trial by jury in the case of misdemeanors might have been waived by a defendant (see *Queen* v. *Sullivan*, 8 A. & E. 831; *King* v. *Sutton*, 8 B. & C. 417; and the dissenting opinion of Judge Aldrich in *Dickinson* v. *United States*, 159 Fed. 801, 814–816), and there is no reason to suppose that the use of the word "shall" in the Constitution was intended to make a jury trial in the case of misdemeanors an absolute necessity or to deprive a defendant of his right to waive it if he deemed it to his best interest to do so. As we shall observe hereafter, a defendant unquestionably has the right to waive many rights which are vital to him. Referring to one such waiver Mr. Justice Brewer in *Schick* v. *United States*, 195 U. S. 65, 71, said:

> Can it be that a defendant can plead guilty of the most serious, even a capital, offense, and thus dispense with all inquiry by a jury, and can not when informed against for a petty offense waive a trial by jury?

Furthermore, we find in the same clause of the Constitution that "such trial shall be held in the State where said crimes shall have been committed." This language is also mandatory, but we do not believe that anyone would seriously question the constitutional validity of an act of Congress which permitted a change of venue to another State upon application of a defendant and for good cause shown.

We submit that the only reasonable construction of the Constitutional provision is that it is a guaranty for the benefit of a defendant and as such it may, at least in the case of a misdemeanor, be waived.

(3) Finally, it is urged against the right of a defendant to waive a trial by jury that it is contrary to public policy. The objection is perhaps most clearly stated in *Cancemi* v. *People*, 18 N. Y. 128, where the court said:

> The State, the public, have an interest in the preservation of the liberties and the lives of the citizens, and will not allow them to be taken away "without due process of law" when forfeited, as they may be, as a punishment for crime. Criminal prosecutions proceed on the assumption of such a forfeiture, which, to sustain them, must be ascertained and declared as the law has prescribed. Blackstone (Vol. 4, 189) says: "The king has an interest in the preservation of all his subjects." And again (Vol. 1, 133), that "Natural life, being the immediate donation of the great Creator, can not legally be disposed of or destroyed by any individual, neither by the person himself, nor by any other of his fellow creatures merely upon their own authority." These considerations make it apparent that the right of a defendant in a criminal prosecution to affect, by consent, the conduct of the case should be much more limited than in civil actions.

However real this interest may have been in former times, it has little force under modern social

and political conditions. Centuries ago, when the calendar of capital crimes numbered more than a hundred, when petty offenses were punishable by most severe and atrocious penalties, and when the term felony, as the word imports, meant a loss of the fee, this interest which the King was supposed to have in the life and liberty of his subjects may have been a very real consideration in requiring that criminal trials should be by jury. But to-day the situation is radically different. While we may suppose it still to exist in the case of capital crimes, and perhaps in all cases of felony, it extends no further. We are much inclined to the opinion of Judge Endlich (*Commonwealth* v. *Beard*, 48 Pa. Superior Ct. 319, 324):

> The only possible conclusion is that the purely theoretical element of public concern, as potential to override the accused's own free choice and render him effectually unfree even before conviction and sentence, can not be regarded as in reality much of a factor in any case.

A further reply to the objection based upon public policy is found in the fact already alluded to, that the supposed interest of the public does not prevent a defendant from pleading guilty and thus waiving not only a trial by jury but by the court as well. This was pointed out in *State* v. *Kaufman*, 51 Iowa 578, 579, where the court said:

> A plea of guilty ordinarily dispenses with the jury trial, and it is thereby waived. This,

> it seems to us, effectually destroys the force of the thought that "the State, the public, have an interest in the preservation of the lives and the liberties of the citizens, and will not allow them to be taken away without due process of law." * * *
>
> It matters not whether the defendant is in fact guilty; the plea of guilty is just as effectual as if such was the case. Reasons other than the fact that he is guilty may induce a defendant to so plead, and thereby the State may be deprived of the services of the citizen, and yet the State never actually interferes in such case, and the right of the defendant to so plead has never been doubted. He must be permitted to judge for himself in this respect. So in the case at bar.

The courts of New York which hold to the rule that trial by jury can not be waived have met the difficulty presented by the universal practice of accepting pleas of guilty, by saying (*Cancemi* v. *People*, 18 N. Y. 128, 138):

> In such a case the preliminary investigation of a grand jury, with the admission of the accusation in the indictment, is supposed to be a sufficient safeguard to the public interests. But, when issue is joined upon an indictment, the trial must be by the tribunal and in the mode which the Constitution and laws provide, without any essential change.

This seems more like an excuse than a reason. Are not the judge, the State's attorney, counsel for the defendant, and the defendant himself to be relied

upon to protect the public interest quite as well as the grand jury and the defendant?

And it is certain that the supposed interest of the public had no influence upon the minds of the framers of the Constitution, for if they had intended to protect the lives and liberties of citizens of the United States because of the interest which the United States had in them, they would have extended the constitutional provision to the states as well as the Federal government. But it is now well settled that the provision is an inhibition upon the national government only and that the states are free to provide howsoever they will for the trial of crimes and may abolish trial by jury entirely if they see fit to do so.

There is a distinction between felonies and misdemeanors.

While there are some authorities to the contrary, the weight of opinion draws a distinction between prosecutions for felony and for misdemeanor. In *Thompson on Trials*, Section 6, the author says:

> While in cases of felony the constitutional right to be tried by a jury of twelve men can not be waived by the accused; in cases of misdemeanor the rule is different, especially where the punishment is a pecuniary fine merely.

This is sustained by *Commonwealth* v. *Dailey*, 12 Cush. (Mass.) 80; *State* v. *Borowsky*, 11 Nev. 119; *State* v. *Cox*, 8 Ark. 436, 447; *Sarah* v. *State*, 28 Ga. 576; *Tyra* v. *Commonwealth*, 2 Metc. (Ky.) 1: *Murphy*

v. *Commonwealth*, 1 Metc. (Ky.) 365; *Commonwealth* v. *Beard*, 48 Pa. Superior Ct. 319; *Turbeville* v. *State*, 56 Miss. 793, 799, and in a number of additional cases cited in the note found in *11 L. R. A. (N. S.) 1136 at p. 1138.*

The irregularity in this case did not amount to a waiver of trial by jury.

Accordingly, if the question here presented were whether a defendant charged with a misdemeanor might waive a trial by jury altogether, we should answer in the affirmative. But we submit that a decision in this case need not go that far. The jury, as we know it, is a body convened to determine facts. When a jury has been duly convened, presided over by a legally competent judge, instructed as to the law, and has reached a conclusion upon the issues of fact committed to it, the parties litigant have not been deprived of any essential element of trial by jury. The recording of the verdict is a formal matter which can not alter or influence the conclusion. It must be done accurately, that the verdict which is recorded may be the same as that which the jury rendered. But to say that this formal act must perforce be done in the presence of the same judge who presided during the trial, is to subordinate substance to form. It is not every feature which accompanied a trial by jury at common law, or which accompanies such trial under ordinary circumstances today, which is essential. (*In re Pennsylvania Hall*, 5 Pa. 204, 208; *Warren* v. *Commonwealth*, 37 Pa. 45, 53; *Smith* v.

Times Publishing Co., 178 Pa. 481, 498–502; *Moschzisker on Trial by Jury*, Secs. 392–394; *Trial by Jury and the Reform of Civil Procedure*, 31 Harv. Law Rev. 669.)

In the case at bar a jury of twelve had been duly and regularly impaneled before a judge qualified and authorized to preside. The court had jurisdiction of the subject matter and of the defendant. The testimony had been fully heard, the judge had delivered his charge, and the jury had retired to deliberate. All this had been done in the time-honored and customary manner, when by reason of circumstances it became necessary for the presiding judge to leave. His successor who assumed control was a judge of the court in which the case had been tried. No act performed by him, however, had the slightest effect upon the verdict, and the defendant does not aver that he has been prejudiced. Everything which a judge is called upon to do *in conjunction with the jury* had been completed. Surely it can not be said that under these circumstances the consent which the defendant gave amounted to a waiver of trial by jury. We submit that the substitution of judges in this case was at most a mere irregularity, a deviation from the customary procedure, which the defendant could waive.

In *Bullock* v. *Neal*, 42 Ark. 278, 280, the court said:

> After the evidence has been admitted, and the law settled, the presidency of the judge is more for the purpose of preserving order in the discussion and in the future conduct of

> the jury than for anything else. It would be an unnecessary delay, expense, and vexation to clients in such cases to empanel a new jury and to recall witnesses. It is not demanded by the ordinary requirements of justice.

In *State* v. *Austin*, 108 N. C. 780, a case of fornication and adultery, it was held that the Clerk might receive the verdict upon the judge's instruction, unless the defendant made objection. The court said (p. 785):

> The defendants had the right to have the verdict rendered in the presence of the judge, and it is best that it should always be done. But it is certainly competent, except in capital cases, for it to be received by the clerk if no exception is made, and the opportunity is given the defendant to object, and such practice is very common.

The same conclusion was reached in *Brown* v. *State*, 63 Ala. 97; and in *State* v. *Keehn*, 85 Kans. 765, and *People* v. *Henderson*, 28 Cal. 465, it was held that even in a murder case the verdict might be received by another judge. In the last-cited case the court said (p. 473):

> As before stated, the Court was properly organized. It was a legal court and had jurisdiction of the case. The question is one of regularity, or perhaps only of propriety and not of jurisdiction. The judge was the judge of that court. There was a legal verdict, and it only remained to pronounce the sentence of the law. * * * The court is the

> same, although a different person occupies the position of judge.

And in *State* v. *Keehn*, 85 Kans. 765, 797, it was said:

> The real ground of decisions like the one just cited is the solid one that the forms prescribed for preserving the authenticity of the verdict have been observed and the parties have not been deprived against their will of opportunity to protect their substantial rights; and whenever this can be said no verdict ought to be set aside merely to satisfy a theory regarding the constitution and organization of the court. * * * [P. 799.] This case is one of the waiver of the presence of the judge at a proceeding involving no judicial action. The court has no hesitation in holding that such a waiver is lawful, and the substantial rights of the defendant were in fact conserved as fully as if the verdict had been returned in open court with the judge presiding. Therefore he has no just ground to complain.

With respect to the imposition of sentence and the entry of judgment upon the verdict, practically all courts agree that these are not parts of a trial by jury and that another judge than the one who tried the case may impose the sentence. In *Freeman* v. *United States*, 227 Fed. 732, 755, upon which the appellee in the instant case will no doubt rely, it was said:

> And there seems to be considerable authority for saying that, where the jurisdiction is not

lost, the judge sitting at a regular term thereof, may pass sentence, although the conviction was had at another term and before another judge. See 12 Cyc. 769; *Clanton* v. *State*, 96 Ala. 111, 11 South 299; *Lamphere* v. *State*, 114 Wis. 193, 89 Northwestern 128; *People* v. *Reilly*, 53 Mich. 260, 18 Northeastern 849; *People* v. *Felix*, 45 Cal. 163; *Ledgewood* v. *State*, 134 Ind. 81, 33 Northeastern 631.

Many irregularities may be waived.

There are many circumstances under which a defendant may waive irregularities of much greater consequence which may profoundly affect the result of a jury trial. This was pointed out by Chief Justice Shaw in *Commonwealth* v. *Dailey*, 12 Cush. (Mass.) 80, 82:

> He may in the first place waive a trial altogether and plead guilty. He may consent to admit legal instruments offered on the other side, without legal proof of execution, on the belief, perhaps, that the evidence will be beneficial rather than injurious to him. He is supposed to understand his own rights or be aided by counsel competent to advise and act for him. In the case supposed the accused may have been successful in laying before the jury all his evidence which he may fear he can not again obtain. A long time may elapse before he can have another trial, and it is important to him to have an early decision on many accounts. In the admission and rejection of evidence, in many points in the conduct of a trial, parties and their

> counsel, we think, may be safely allowed to judge as to what they will insist on and what they will waive. Having so done and taken their chance for a verdict, it would be inconsistent with ordinary good faith and fair dealing to turn around and insist on legal exceptions which they had pledged themselves to the court that they would not take.

In *Cancemi* v. *People*, 18 N. Y. 128, 137, it was said:

> Effect may justly and safely be given to such consent in many particulars; and the law does in respect to various matters regard and act upon it as valid. Objections to jurors may be waived; the court may be substituted for triers to dispose of challenges to jurors; secondary in place of primary evidence may be received; admissions of facts are allowed; and in similar particulars, as well as in relation to mere formal proceedings generally, consent will render valid what without it would be erroneous. A plea of guilty to any indictment, whatever may be the grade of the crime, will be received and acted upon if it is made clearly to appear that the nature and effect of it are understood by the accused.

But the decisions of this Court furnish a most notable instance of the waiver of a very serious irregularity which was declared to be binding upon the defendant. In *Queenan* v. *Oklahoma*, 190 U. S. 548, which came to this Court upon a writ of error to the Supreme Court of Oklahoma, it appeared that during the course of a trial for murder the State's attorney discovered that a juror, contrary to his declaration

upon *voir dire*, was in fact disqualified because of his conviction of a felony. The discovery was at once made known to the court and to counsel for the defendant, who was asked whether he desired to withdraw the juror and discontinue or whether he would proceed with the remaining eleven. He declined to state. Whereupon the trial proceeded and resulted in a conviction. His action was held to be a valid waiver of the irregularity. Mr. Justice Holmes, speaking for the Court, said (p. 552):

> * * * it was his duty to object at the time if he was going to object at all. He could not speculate on the chances of getting a verdict and then set up that he had not waived his rights.

It may be, and it would not be inconsistent with our contentions, that if something had occurred at the taking of the verdict in the case at bar whereby he had been prejudiced by the substitution of judges, he might in the discretion of the court be permitted to withdraw the consent given. In the absence of any showing of such prejudice, however, we submit that he was bound by his waiver.

"The day of mere technicality is past."

We confidently believe that the day has passed when technicalities such as the one presented by this record ought to stand in the way of substantial justice. The framers of the Constitution, the great body of our colonial fathers who ratified it, and the vast majority of the public to-day for whose benefit

the ancient institution of trial by jury is preserved, would look with astonishment upon a judgment discharging the defendant upon this record. We believe with Judge Endlich that "the day of mere technicality is past" (*Commonwealth* v. *Beard*, 48 Pa. Superior Court, 319, 323). And "If it be true that numerically those [cases] preponderate in which the right of waiver has for one reason or another been denied, it is very confidently believed that those affirming it have the better of the argument, are more in accord with rational modern views of legal procedure, conform alike to ordinary notions and to the highest practical standards of right and fairness, and fall in readily with the common sense way in which the law of this state deals with questions not backed by actual and substantial as opposed to abstract and technical merit." (Id. 326.)

We respectfully submit that a decision from this court declaring that the appellee had been deprived of a trial by jury under the circumstances presented in this record would be a step backward. The time was when the entire legal profession and probably a large part of the public deemed the strict rules of common law pleading to be sacrosanct, and the hands which first touched the artificial refinements and tedious technicalities of procedure at common law were considered impious. But during the past century there has been an increasing impatience with the technicalities of the law and a growing insistence that they be discarded and replaced by

plain and simple rules dictated by common sense. The quaint, curious, circuitous, and redundant language of the ancient pleas now stands like "the defaced sculpture of the inscription which the ignorant monk can scarcely read to the inquiring pilgrim." Indictments which once must needs be burdened with a wealth of useless verbiage are now deemed sufficient in most jurisdictions if they be phrased substantially in the language of the statutes. And in the conveyance of lands the simple words "grant and convey" now fill the office of a whole page of the ancient scrivener's art.

It is true there are some courts which still insist upon viewing legal institutions like the mummy wrappings buried for centuries in the tomb of some Egyptian monarch, apparently fearful that they may fall to pieces if they be touched. We believe, however, that there is ample vitality in the institution of jury trial to withstand the effects of the judgment which common sense dictates in this case.

No court has been more quick than this one to distinguish between substance and shadow, to hold fast to that which is fundamental and reject that which is merely technical, and to mold our legal institutions into such form as will fit modern conditions. The time was when the rule of strict construction of penal statutes was so strictly adhered to that the language was twisted and distorted by every conceivable device to prevent its application to the prisoner at the bar. This court, however, in two opinions by Chief Justice Fuller (*United States* v.

Lacher, 134 U. S. 624, and *Johnson* v. *Southern Pacific Company*, 196 U. S. 1) pointed out that the reasons for this rule lay in the social conditions of an age gone by, and that to-day penal statutes must be given a sensible construction in accordance with the evident intent of the legislature.

In holding that a prosecution for murder in the courts of California, which was begun by information instead of indictment, did not deprive the defendant of due process of law it said, through Mr. Justice Matthews (*Hurtado* v. *California*, 110 U. S. 516):

> It follows that any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law.

It is interesting to note the case of *Crain* v. *United States*, 162 U. S. 625, which was cited by the Circuit Court of Appeals in *Freeman* v. *United States*, 227 Fed. 732, 744, as an instance in which this court had sustained the most trifling technicality. In the *Crain case* the court set aside a judgment of conviction of forgery and a sentence of imprisonment for three years because the record did not affirmatively show that the accused had been formally arraigned or that he had pleaded to the indictment, although it showed that the jury had been duly selected, empanelled, and sworn "to try the issue joined," and that after hearing the evidence and argument they retired to

consider the verdict, which they subsequently returned to the court. The Government claimed that it should be assumed that the defendant had pleaded not guilty, and the failure of the clerk to record the fact was a clerical error which did not prejudice substantial rights. The court, however, through Mr. Justice Harlan, said that the irregularity was fatal. Justices Peckham, Brewer, and White dissented.

This case was specifically overruled in *Garland* v. *Washington*, 232 U. S. 642, 646, where the court, through Mr. Justice Day, said:

> Technical objections of this character were undoubtedly given much more weight formerly than they are now. Such rulings originated in that period of English history when the accused was entitled to few rights in the presentation of his defense, when he could not be represented by counsel, nor be heard upon his own oath, and when the punishment of offenses, even of a trivial character, was of a severe and often of a shocking nature. Under that system the courts were disposed to require that the technical forms and methods of procedure should be fully complied with. But with improved methods of procedure and greater privileges to the accused, any reason for such strict adherence to the mere formalities of trial would seem to have passed away, and we think that the better opinion, when applied to a situation such as now confronts us, was expressed in the dissenting opinion of Mr. Justice Peckham, speaking for the minority of the court in the Crain case.

And in the recent case of *Ex parte Peterson*, 253 U. S. 300, 309–310, Mr. Justice Brandeis said:

> New devices may be used to adapt the ancient institution [of trial by jury] to present needs and to make of it an efficient instrument in the administration of justice. Indeed, such changes are essential to the preservation of the right. The limitation imposed by the Amendment is merely that enjoyment of the right of trial by jury be not obstructed, and that the ultimate determination of issues of fact by the jury be not interfered with.

The Government does not seek by this appeal to undermine the venerable institution of trial by jury nor to remove a single safeguard which has been erected through a dozen centuries and at infinite cost to protect the rights and liberties of a free people. We recognize the inherent merit of this great mode of trial. But we do insist that veneration for the institution, respect for its traditions, and recognition of its essential worth do not require a slavish adherence to unsubstantial forms, nor justify the blind fear and dread which hesitates to yield a technicality for no other reason than that—

> 'Twill be recorded for a precedent,
> And many an error by the same example
> Will rush into the state.

Trial by jury will in no way be imperiled by reversing the judgment of the court below and declaring in this case that when a defendant deliberately consents to an immaterial modification of the usual mode of procedure, agrees that he will take no exception to

it, and actually suffers no prejudice as a result of it, his consent is valid and binding upon him. To hold otherwise is to put a premium upon bad faith.

II.

Habeas corpus was not the proper method of review.

The trial court did not lose jurisdiction of the cause by reason of the substitution of judges. It is a common practice in civil cases to have the verdict taken by another judge or by the clerk of the court, yet it has never been supposed that by such a circumstance jurisdiction was lost, or that the trial was any the less a trial by jury. In *Commonwealth* v. *Beard*, 48 Pa. Superior 319, 324, a case in which one juror by consent was withdrawn on account of illness, the court, referring to the objection that jurisdiction had thereby been lost, said:

> That this objection, if good, would logically apply with equal force to a trial and verdict in a civil case by a jury from which one had been by consent excused, so as to preclude a review on application for a new trial, etc., is very manifest. Granted that under constitutional and statutory provisions in civil cases a jury may be wholly dispensed with, and they may be taken out of court by reference to arbitration, yet if they are not so disposed of, if they are brought to trial before a jury, it is certain that numerically the latter is exactly the same as in a criminal case, and that, in the one as in the other, the integrity of its ordained composition as a constitutional

> tribunal for the trial of the cause is equally affected by the withdrawal of one of the jurors; and there is exactly the same reason for treating the proceeding as a species of extra-constitutional and extra-statutory arbitration before a tribunal unknown to the law. Nevertheless every one familiar with civil practice knows that just that thing is constantly done without doubt of its competency or thought of ensuing difficulty.

If the defect be jurisdictional, it can no more be cured by consent in a civil than in a criminal case.

If we be correct in the view we take that the irregularity which occurred in the trial of this defendant was not fundamental and jurisdictional, then it follows from a long series of decisions of this court that it was not reviewable by habeas corpus and the writ should have been dismissed by the District Court.

Ex parte Watkins, 3 Pet. 193.
Ex parte Parks, 93 U. S. 18.
Glasgow v. *Moyer*, 225 U. S. 420.
Matter of Gregory, 219 U. S. 210.
Harlan v. *McGourin*, 218 U. S. 442.
Craig v. *Hecht*, 82 October Term 1923 (opinion delivered November 19, 1923).

CONCLUSION.

The defendant was represented by able counsel and gave his consent at a time and under conditions when perfectly free whether to consent or not, without any liability to prejudice by reason of a

refusal. Having deliberately taken the chances of the result, he should, upon every analogy in our law and upon the most obvious grounds of good faith and justice be precluded from retracting it when disappointed in the result. (*Commonwealth* v. *Beard*, 48 Pa. Superior 319, 325; *Queenan* v. *Oklahoma*, 190 U. S. 548, 552.)

We respectfully submit that the judgment of the District Court awarding and sustaining the writ of habeas corpus and discharging the appellee was erroneous and should be reversed.

Respectfully submitted.

GEORGE ROSS HULL,
Special Assistant to the Attorney General.

JANUARY, 1924.

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In the Supreme Court of the United States

OCTOBER TERM, 1923.

THE UNITED STATES OF AMERICA, APPELLANT,

v.

JOHN VALANTE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE ~~UNITED STATES~~ appellee.

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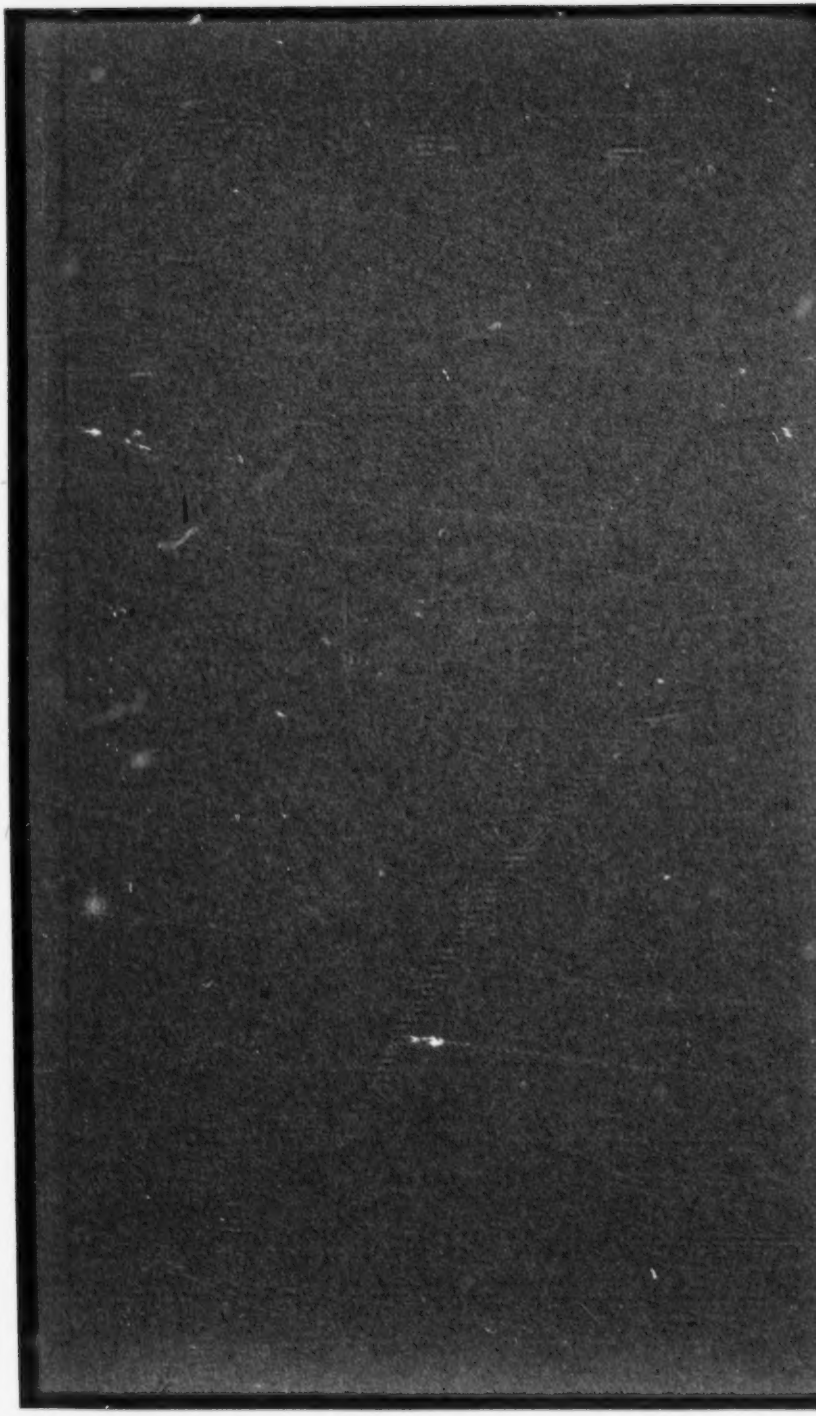

INDEX.

Statement of case..... 1

Argument 1

Authorities.

Cases:

Freeman v. U. S., 227 Fed. 732..... 3

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF OF THE APPELLEE.

STATEMENT.

The statement of facts in the Government's Brief is substantially correct.

ARGUMENT.

I.

The contention of the Appellee is well stated in the Government's Brief (page 5) wherein it is said, "It will be urged by the Appellee that the constitutional provision that 'the trial of all crimes, except

in cases of impeachment, shall be by jury' (Article III, Section 2, Clause 3) is mandatory and cannot be waived; that a presiding judge is an essential element of such trial; that the same judge must continue throughout the trial; and that the trial is not concluded until the verdict has been received, the sentence imposed, and the judgment entered."

It is the Government's contention: "On behalf of the Government we shall contend that the question whether a jury trial may be waived is not directly involved in the case, but only the question whether a minor technical irregularity incident to the conduct of such trial may be waived; or, as it is put in some of the cases, whether the defendant may stipulate beforehand, on the record, that he will take no exception to such irregularity, and if he does, whether the court can not legally act upon it, and carry such stipulation into effect."

At the outset it ought to be stated that the defendant in the case at bar did not waive a trial by jury. He was put on trial before a legally constituted court and jury, but before the trial was concluded, the trial judge (a District Judge of the United States District Court for the Northern District of Alabama, sitting in the District Court for the Southern District of New York, by designation of the Chief Justice of the United States), stated (pages 5-6 of the record): "that he was leaving the jurisdiction of the court and was to return to his home in Alabama the same afternoon and it was necessary for him to leave the court house." The following appears on page 6 of the record:

At 1:30 P. M., the jury not having agreed upon a verdict, it was agreed by both counsel, that in the

absence of Judge Grubb, any other Federal judge may receive the verdict and impose sentence, if necessary, with the same force and effect as though said Federal judge had presided in place and stead of Judge Grubb.

"After the entry of said stipulation upon the minutes of the court, Judge Grubb left the court house and returned to the State of Alabama.

"At about 3 o'clock P. M., the jury returned into court, whereupon the following proceedings were had:

"The court convened at 2:45 P. M.

"Judge John C. Knox presided for the purpose of receiving the verdict under the foregoing stipulation."

From the record, *supra*, it will be seen that the stipulation entered into does not concern itself with *a minor techincal irregularity incident to the conduct of a trial.*

The stipulation here seeks to void a mandatory constitutional provision. It is perfectly obvious that were such stipulations permitted, mandatory constitutional provisions would have no force or effect. In the case of Freeman against the United States, 227 Federal 732, cited by the Appellant, the Circuit Court of Appeals for the 2nd circuit concluded that the defendant could not consent to the substitution of another judge in the midst of a trial.

In the case at bar the defendant was deprived of his right to move the trial court to set aside the verdict which was rendered, for any of many reasons such a motion could have been properly made, for the trial judge had departed from the jurisdiction of the court. The judge who received the verdict could not have decided such a motion fairly,

because he did not have the opportunity of seeing the witnesses or hearing them testify. His decision would have been based solely from an examination of the record, which would deprive the defendant of the benefit of the trial court's personal observation of the witnesses.

The Government contends that the substitution of a judge is a minor technical irregularity. Such a contention is untenable, since it is elementary that the trial judge is the most important function of the Court, for during a trial it is only to him that a defendant can look for the preservation of his rights.

If it were ever intended by the framers of our laws that the trial judge was not of the utmost importance, then surely some provision for the substitution of judges during a trial would have been specifically provided for.

If the argument of the Government is tenable that a defendant in a criminal case has the right to stipulate for the substitution of judges during the trial of his case, then why would the defendant not have the right while the trial is in progress to consent to the substitution of new jurors?

In criminal cases it has been the law since time immemorial that the important element is the preservation of the Public Interest.

The argument of the Government (page 16) "Are not the judge, the State's attorney, counsel for the defendant and the defendant himself to be relied upon to protect the public interest quite as well as the grand jury and the defendant," shows the error of the Government's contention. To answer "Yes" would take away the provision of law which sets forth clearly and concisely what must be done before a defendant can be convicted of an offense.

The law says that there must be first an accusation by a Grand Jury, yet this provision of law which has been adhered to strictly in the courts of the United States, is disregarded by counsel for the Government to meet his purpose.

There is a great deal of difference between (1) the receiving of the verdict by the trial judge and the imposing of sentence and entry of judgment by another judge and (2) the abandonment of the trial itself by the trial judge and the receiving of verdict, imposition of sentence and judgment by another judge as in the case at the bar. In the first instance the jury had completed its duty. It returned its verdict to the judge before whom the trial was had. There was nothing further the jury could do; while in the latter instance the trial court left the jurisdiction before the jury had completed its duties. During this interim the trial judge might have been called upon by the jury to do certain things which under all the circumstances no other judge could do.

II.

The Government contends that the trial court did not lose jurisdiction of the cause by reason of the substitution of judges. This contention is untenable because the trial judge left the jurisdiction of the court before the jury returned the verdict. The judge who received the verdict, who imposed the sentence and who entered the judgment of the court is the judge who had no jurisdiction to do these things, because the court, over which he attempted to preside had ceased to exist insofar as this case was concerned, the trial judge having announced his intention to leave the jurisdiction of the court before

the trial had concluded and having actually departed from the court house for that purpose.

Therefore in view of the fact that the defect is jurisdictional, Habeas-Corpus was the proper method of review.

CONCLUSION.

It is respectfully submitted that the judgment of District Court awarding and sustaining the writ of habeas corpus and discharging the appellee was correct and should be affirmed.

Respectfully submitted.

ABNER SIEGAL,
Attorney for the Appellee.

March, 1924.